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R. *v.* Owen, [2003] 1 S.C.R. 779, 2003 SCC 33

Her Majesty The Queen *Appellant*

v.

Terry Steven Owen *Respondent*

Indexed as: R. *v.* Owen

Neutral citation: 2003 SCC 33.

File No.: 28700.

2003: January 15; 2003: June 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Criminal law — Mental disorder — Dispositions by Review Board — Standard of review applicable to Board's order — Criminal Code, R.S.C. 1985, c. C-46, s. 672.78.

Criminal law — Mental disorder — Review Boards — Dispositions by Review Board — Accused found not criminally responsible on account of mental disorder — Accused having ongoing substance abuse problems and continuing to show some propensity towards violence — Review Board ordering continued detention of accused at psychiatric hospital — Whether Board's order unreasonable — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.78.

Criminal law — Mental disorder — Review Boards — Appeal on transcript — Additional evidence — Review Board ordering continued detention of accused at psychiatric hospital — Whether fresh post-review affidavit evidence adduced by Crown properly excluded by Court of Appeal — Meaning of "interests of justice" — Criminal Code, R.S.C. 1985, c. C-46, s. 672.73(1).

The respondent was found to be not criminally responsible ("NCR") on account of mental disorder for the offence of second degree murder committed in 1978 in a psychotic state induced by drug abuse. Following a period of detention in various institutions for mental health care, he was gradually released into the community until 1987 when he was convicted of possession of a prohibited weapon, break and enter with intent to commit an indictable offence and possession of property obtained by crime. After the completion of his sentence, the respondent was returned to custodial care, where other incidents involving violence occurred. Efforts were again made to release the respondent gradually into the community, but the problems with substance abuse re-occurred, and he continued to show some propensity towards violence. Review Board dispositions in 1994, 1995 and 1996 provided for conditional discharges but in 1997, when the respondent's urine tested positive for cannabis, the psychiatric hospital told the Board that it could no longer support a conditional discharge order because of the respondent's continued substance abuse and the hospital's need for flexibility "to react quickly to known increases in risk".

Under s. 672.54 of the *Criminal Code*, the Board's disposition must be the least onerous and least restrictive to the accused, having regard to (1) the need to protect the public from dangerous persons, (2) the mental condition of the accused, (3) the reintegration of the accused into society and (4) the other needs of the accused. The Board, after a full hearing, concluded that the respondent constituted a significant danger to the safety of the public and ordered his continued detention at a psychiatric hospital. At the Court of Appeal, the Crown sought to bolster the Board's decision with fresh affidavit evidence which alleged that, since the date of the Board hearing, the respondent had punched another patient, threatened to kill yet another patient, and was found in possession of prohibited drugs. The Court of Appeal declined to admit the fresh evidence, proceeded to review the Board's order based on the evidence available at the original hearing, set aside the Board's order as unreasonable, and directed that the respondent be absolutely discharged.

Held (Arbour J. dissenting): The appeal should be allowed. The Review Board's order was not unreasonable and should be reinstated.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.: The Review Board's assessments of mental disorders and attendant safety risks call for significant expertise and the appropriate standard of review, reflected in s. 672.78 of the *Criminal Code*, corresponds to reasonableness *simpliciter*.

The Court of Appeal reweighed the evidence and found it wanting. That assessment, however, was for the Board to make, and the decision it made was reasonably open to it on the evidence. It was not enough to suggest that other members of other review boards might have taken a different view of the evidence. The Review Board could reasonably conclude that the respondent's demonstrated capacity for violence when taking amphetamines or cocaine, now linked to recent evidence of resumed use of cocaine, rendered him a significant threat to the public's safety. The "logical process" by which it sought to draw its conclusion from the resumed use of cocaine was squarely within its expertise.

The Ontario Court of Appeal pointed out that from 1994 to 1996 the respondent had been granted conditional discharges, but in 2000 the Review Board was required to deal with the respondent's situation as it found it to be in 2000. The various hospital recommendations from 1994 to 1999 were made at a time when the hospital mistakenly believed that the respondent was undertaking successful steps to control the substance abuse that, in its view, had been the catalyst for earlier acts of violence.

Given the continuing use of cocaine and the consequent risk to society posed by the respondent, it was also not unreasonable for the Review Board to have concluded that its disposition was the least onerous and least restrictive alternative. The respondent's own history of drug abuse and concealment persuaded the Review Board that there was little prospect of his drug habit being effectively controlled with the sporadic supervision available after release into the community.

The respondent says that he is entitled to an absolute discharge because if he were to re-offend while on drugs, he would still be subject, like anyone else, to the strictures of the *Criminal Code*. But he is not "like anyone else". He is a NCR detainee whose drug abuse is linked to a propensity for violence, including murder, and Part XX.1 of the *Criminal Code* is designed to take measures to protect the public safety *before* violence occurs, not (as in the ordinary case) to punish the offender afterwards.

The Court of Appeal erred in law in rejecting the fresh evidence. An appeal against a disposition order is to be based on a transcript of the evidence and, pursuant to s. 672.73(1) of the *Code*, "any other evidence that the court of appeal finds necessary to admit in the interests of justice". The term "interests of justice" takes its meaning from the context in which it is sought to be applied and includes not only justice to the NCR detainee, whose liberty is at stake, but also justice to the public,

whose protection is sought to be assured. The proffered evidence (including physical assaults in 2000 and a recent death threat) was highly relevant. It went to the core of the Court of Appeal's concern about the adequacy of evidence of the respondent's continuing propensity for violence and, if credible, ought to have been admitted as bearing on a decisive issue. An absolute discharge should be granted only upon consideration of all of the reliable evidence available both at the time of the Board hearing and, if appealed, at the time of the appellate review. The fresh evidence was therefore admitted as part of the record on this appeal.

Per Arbour J. (dissenting): The standard of review applicable to the Review Board's disposition was reasonableness *simpliciter* and, in this case, the Court of Appeal correctly concluded that the Board's ruling was unreasonable.

First, the Board's finding regarding the respondent's dangerousness was unreasonable. In determining whether an accused is a significant threat to the safety of the public, the Board must consider all the factors listed in s. 672.54 of the *Criminal Code*. If the mental condition of the accused is such that he or she no longer suffers from a mental disorder, the accused's mental condition should not be confused with his or her propensity to commit crimes and, in that respect, the accused should be answerable to criminal sanctions like anyone else. The mental disorder detention regime seeks to guard against the repetition of dangerous conduct that a mentally disordered accused is likely to engage in and for which he or she would not be held responsible. The Court of Appeal thus correctly concluded that the Board improperly punished the respondent for his successful deception regarding his drug habit. Justifying the respondent's detention within the NCR system by his continuous substance abuse problems is equivalent to imposing such a burden on the respondent so as to deny him the possibility of ever getting out of the system, despite a prolonged absence of any violent behaviour. The Board's assessment of the risk posed by the respondent was entirely speculative and not supported by a proper appreciation of the record.

Second, on the facts of this case, it was unreasonable for the Board to conclude that the custodial disposition imposed was the least onerous disposition available in the circumstances in that it accorded the respondent as much liberty as is compatible with public safety. Even if the respondent constituted a sufficient threat to the community to preclude his absolute discharge, the Board was required to embark on an evaluation of all four of the factors outlined in s. 672.54 in order to determine whether a conditional discharge or a custodial order was the appropriate disposition.

There was no reason to interfere with the exercise of the Court of Appeal's discretion in its appreciation of the fresh evidence tendered. Section 672.73(1) of the *Code* permits the Court of Appeal to admit any evidence "that [it] finds necessary to admit in the interests of justice". Where a court of appeal is of the opinion that an NCR accused should have been granted an absolute discharge at the Review Board hearing, the new evidence should be virtually conclusive that an absolute discharge is not appropriate before a court of appeal should decide not to order it. Moreover, it is not clear that an

absolute discharge of an NCR detainee terminates the state's capacity to supervise and monitor the respondent's mental condition. Indeed, s. 672.82(1) of the *Code* provides for discretionary review of any disposition of the Board.

Cases Cited

By Binnie J.

Distinguished: *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32; **referred to:** *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *R. v. Swain*, [1991] 1 S.C.R. 933; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15; *Peckham v. Ontario (Attorney-General)* (1994), 93 C.C.C. (3d) 443; *Beauchamp v. Penetanguishene Mental Health Centre (Administrator)* (1999), 138 C.C.C. (3d) 172; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (1999), 131 C.C.C. (3d) 473, leave to appeal refused, *sub nom. Clement v. Attorney General for Ontario*, [1999] 1 S.C.R. vi; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Stolar*, [1988] 1 S.C.R. 480; *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269; *R. v. Warsing*, [1998] 3 S.C.R. 579; *Ares v. Venner*, [1970] S.C.R. 608; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Lévesque*, [2000] 2 S.C.R. 487, 2000 SCC 47; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26.

By Arbour J. (dissenting)

R. v. Biniaris, [2000] 1 S.C.R. 381, 2000 SCC 15; *R. v. Yebes*, [1987] 2 S.C.R. 168; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Stolar*, [1988] 1 S.C.R. 480; *R. v. Morin* (1995), 37 C.R. (4th) 395.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46 [am. 1991, c. 43], ss. 16(1), 672.34, 672.38(1), 672.39, 672.4(1), 672.43, 672.51, 672.54, 672.73(1), 672.78, 672.81(1), 672.82, 683(1), 686(1)(*a*).

Health Care Consent Act, *1996*, S.O. 1996, c. 2, Sch. A, s. 80(9).

Inquiries Act, R.S.C. 1985, c. I-11, ss. 4, 5.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 54 O.R. (3d) 257, 145 O.A.C. 142, 155 C.C.C. (3d) 82, 42 C.R. (5th) 362, [2001] O.J. No. 1710 (QL), setting aside a decision of a Review Board. Appeal allowed, Arbour J. dissenting.

Riun Shandler, for the appellant.

Brian Snell, for the respondent.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ. was delivered by

1 BINNIE J. — The 1991 amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*") established a new review system for individuals, like the respondent, who have been found not criminally responsible for a criminal offence on account of mental disorder. In the respondent's case, the offence was second degree murder committed in 1978 in a psychotic state induced by drug abuse. On May 17, 2000, the Ontario Review Board ("Board"), after a full hearing, concluded that the respondent continued to constitute a significant danger to the safety of the public and ordered his continued detention at the Kingston Psychiatric Hospital ("KPH"). At the Court of Appeal, the Crown sought to bolster the Board's decision with fresh affidavit evidence which alleged that, since the date of the Board hearing, the respondent had punched another patient, threatened to kill yet another patient, and was found in possession of prohibited drugs. The Court of Appeal declined to admit the fresh evidence, proceeded to review the Board's order based on the evidence available at the original hearing, allowed the appeal, set aside the Board's order as unreasonable, and directed that the respondent be absolutely discharged.

2 In my view, the appeal should be allowed. Giving due deference to the Board's expertise in these matters, its decision was not unreasonable on the record before it. Moreover, with respect, the Court of Appeal erred in law in rejecting, without reasons, the fresh evidence. Evidence of violent behaviour in the year 2000 by the respondent was relevant to the crux of the court's decision that the respondent should no longer be detained as a significant threat to the safety of the public. The fresh

evidence confirmed in part the factual basis of the Board's May 17, 2000 order. The statutory procedure for dealing with individuals adjudged not criminally responsible by reason of mental disorder is inquisitorial, not adversarial. A decision to grant an absolute discharge should be based on the best information available including, where appropriate, fresh information before a court of appeal that postdates the original Board hearing.

3 The disposition of this appeal will have limited effect on the respondent. We are dealing with events that are now three years in the past. He is entitled to an expert and independent review of his detention at least every 12 months, and sooner "at any time", in the Board's discretion (s. 672.82 (1)). These annual reviews, required by the *Criminal Code*, will continue until he receives an absolute discharge. He is thereby assured that any further disposition orders regarding his continued detention or eventual discharge will be made on up-to-date information and assessments. Fairness is thereby assured to both the respondent and to the public.

I. Facts

4 On October 10, 1978, the respondent was found not guilty by reason of a mental disorder of a charge of second degree murder. The circumstances of the murder (the "index offence") were described in the report of the North Bay Psychiatric Hospital dated October 1990, as follows:

> [The respondent] had been living with the 22 year old [male] victim, who was from the Chatham area. They had been together about three months. The offence occurred in the morning, but the [respondent] stated he did not remember too much. He remembered having been paranoid for some weeks prior to the offence and that he had this song in his head. He cannot remember what the song said. He had slept at night before the offence and remembered having an apple spiked with MDA. In the morning the [respondent] and another man shared this apple. The [respondent] states that he had been scared and paranoid for some time but he was not quite conscious of it. However, after consuming the apple he was afraid of his friend and believed that his friend had been involved in the killing of his grandfather, although [the respondent's] grandfather was not killed but died of natural causes. The [respondent] remembered hitting the man with a stick or something. [The respondent] also had a gun. After the offense he stopped and stood there until the police came. The man died shortly afterwards of the wounds that were inflicted. [The respondent] was charged with Murder.

5 Prior to the 1978 murder, the respondent had acquired a criminal record for breaking and entering, obstructing a police officer, trafficking in narcotics, possession of narcotics and possession of stolen property.

6 Following a period of detention in various institutions for mental health care, the respondent was gradually released into the community until 1987 when he was arrested on charges of possession of a prohibited weapon, break and enter with intent to commit an indictable offence and possession of property obtained by crime. On June 15, 1988, he was convicted of all three charges. Following completion of his sentence, the respondent was returned to the North Bay Psychiatric Hospital. In 1989, he got into a disagreement with the staff about hospital privileges, and the hospital report indicates that he lost his self-control and punched a car door so hard that he broke bones in his hand, requiring a cast. The respondent was reported to have stated, "[i]t was either the door or Brad's jaw, man, I had to hit something". Subsequently, in January 1990, while living in the community, the respondent severely fractured a man's jaw with a pool cue during a disagreement while under the influence of alcohol. The respondent was convicted of assault causing bodily harm on June 7, 1990, and sentenced to 14 months in prison.

7 Thereafter, efforts were again made to release the respondent gradually into the community, but the problems with substance abuse re-occurred, and he continued to show some propensity towards violence. In 1991, for example, the respondent was admitted to the KPH's secure unit. While there, he engaged in what were called "assaultive behaviours" while under the influence of alcohol. A 1992 risk assessment conducted by the Ontario Ministry of Health placed the respondent in a category of violent offenders for which it was predicted that 44 per cent would re-offend violently within seven years after release. A 1992 KPH report signed by the hospital medical staff noted that the respondent's risk assessment included abuse of street drugs and/or alcohol, and violence against other persons:

> [The respondent's] prognosis continued to be extremely guarded given his lack of insight into his situation, his lack of regard for other persons, and his intolerance of the system. It was predicted that a circumstantial situation will likely compromise his liberty at an early stage in community living. [The respondent] has a history of repeated offences, including unprovoked violence, indulgence in drugs and alcohol, and a cavalier attitude, making him a serious risk to the community.

8 Nevertheless, Board dispositions in 1994, 1995 and 1996 provided for conditional discharges. In 1997, the respondent's urine tested positive for cannabis, and KPH told the Board that it could no longer support a Conditional Discharge Order because of the respondent's continued substance abuse and the hospital's need for flexibility "to react quickly to known increases in risk":

> [W]hen the hospital is unable to require either hospital admission or significant changes in supervision, the community is placed at risk. The community would fail to appreciate why it is that KPH is unable to react quickly to known increases in risk. This situation is very

> likely to occur time and time again in the future. The role of the hospital should be to ensure that it is managed in a timely manner, consistent with the long-term rehabilitation needs of [the respondent] and not contrary to the safety of the public. The hospital sees no useful purpose in a several month hospitalization every time this happens while [the respondent] awaits the pleasure of the Board. Indeed the results of the current administrative arrangement — a Conditional Discharge Order — are contrary to the rehabilitation needs of [the respondent] and do nothing to protect the public.
>
> . . .
>
> [The respondent] will always remain at risk for drug and alcohol consumption and for related antisocial behaviours. Risk will increase unacceptably when this occurs. The hospital should be equipped to deal with this by way of discretionary authority vested in a custodial order. [Emphasis added.]

9 The Board's dispositions in 1997, 1998 and 1999 provided that the respondent be detained at KPH but live in Kingston, again on the condition that he abstain from non-medical use of alcohol and drugs. In March 1999, the hospital reported that:

> The team is of the opinion that [the respondent] continues to represent a risk to the safety of the public.

In 2000, his continued use of cocaine was detected, as described below.

10 Over this period, the respondent formed a common law relationship. He and his common law wife had a child to whom the respondent is devoted. The respondent and his common law wife eventually separated and for a period of time the respondent looked after the child. It is evident from his testimony that his inability to leave the hospital and thereafter to look after his son is a major concern. The stresses of single parenthood combined with severe financial difficulties took their toll. In 1999, he was convicted of alcohol-induced impaired driving and given a custodial sentence. The child went to live with the mother but, on September 30, 1999, was taken into care by the Children's Aid Society.

11 Both the common law wife and her daughter by another union advised the hospital authorities that the respondent was "fooling" the drug tests over a period of years by substituting other peoples' urine samples. On being retested under close scrutiny on January 25, 2000, the respondent

tested positive for both cocaine and cannabis. He then admitted that apart from a period of about 18 months prior to the birth of his child, he had never abandoned his drug habit, and, it seems, does not intend to do so.

II. Judicial History

A. *Ontario Review Board* (May 17, 2000)

12 The Board reviewed the facts and circumstances noted above, and noted that, following the positive drug test, the respondent now freely admitted a drug habit of many years (though not the use of cocaine). His counsel disputed the hospital's contention that the "combination of drug use, alcohol use and stressors in his [client's] life" was "a fatal combination that" created "a significant risk":

> What I say is that those factors have been in his life for a decade and there has been no indication of any acting out, of any violent behaviour, of any abusive behaviour — or of any reoccurrence of the mental illness that was present during the index offence.

13 The Board concluded that the respondent's "drug-induced psychosis is currently in remission. However, he continues to suffer from a very serious antisocial personality disorder which is complicated by alcoholism and substance abuse." The respondent's attending physician at the KPH testified that cocaine induces an effect comparable to the amphetamines that were found to have induced the psychotic state in which the respondent committed murder in 1978. In the Board's view, the evidence showed that the respondent "continues to expose himself to those very elements that produced the drug-induced psychosis and disinhibited him to the point where he lost control of his behaviour" (emphasis added).

14 The Board noted the hospital administrator's opinion that the respondent "represents a significant risk to the safety of the public. He has demonstrated that even with close controls he engages in behaviours that could potentially place members of the public at risk. The presence of cocaine is most troubling given its similar profile to amphetamine, which was implicated in his index offence and drug induced paranoid state."

15 The Board accordingly concluded that "taking into consideration the need to protect the public from dangerous persons[,] the mental condition of the [respondent], the reintegration of the [respondent] into society and the other needs of the [respondent], the Board is of the unanimous view

that the least onerous and least restrictive disposition" would be continued detention at the KPH, with discretion to permit the respondent compassionate leave, staff-accompanied hospital and grounds privileges, and staff-accompanied entry into the community. The respondent was required to abstain absolutely from alcohol and non-prescription drugs and to submit a sample of his breath and/or urine for testing purposes.

B. *The Fresh Evidence Application*

16 The Board hearing was held in March 2000. When the matter came before the Court of Appeal, the Crown sought to introduce as fresh evidence the KPH report prepared for the respondent's *subsequent* January 2001 Board hearing, which attached various hospital records showing that during the year 2000 the respondent "has threatened to harm co-patients on numerous occasions". On March 29, 2000, he was placed "in seclusion because his behaviour escalated to aggressive postures and [was] threatening in nature". On April 10, 2000, he was recorded as "tormenting" a co-patient, eventually asking "Are you going to kill me in the night?" In September 2000, further drug paraphernalia was found and charges laid. During a urine test the same month, the respondent was recorded as telling a nurse, "I feel like I should be cracking somebody on the head like I've wanted to do for the last 10 years." On September 26, 2000, he is recorded as yelling at a co-patient apparently in his room in search of a stolen watch, "You fucking bastard. Come to my room one more time and I will kill you. See those fucking cameras. They mean shit to me. I will kill you. I haven't killed in 20 years but I'll do it again." On December 12, 2000, the respondent got into a fight with a co-patient in which he punched the other patient in the nose. The incident was witnessed by a number of other patients.

C. *Ontario Court of Appeal* (2001), 54 O.R. (3d) 257

17 The Court of Appeal (Catzman, Weiler and Rosenberg JJ.A.) concluded that the decision of the Board was unreasonable and could not be supported by the evidence given at the original hearing.

18 The court did not admit the fresh evidence and gave no reason for its refusal.

19 The court reviewed the relevant provisions of the *Criminal Code* including "the need to protect the public from dangerous persons" (s. 672.54) and expressly noted that the onus was on the Crown to establish that the respondent constitutes "a significant threat to the safety of the public" (s. 672.54(*a*)). Reference was made to *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. The court noted that the KPH had not considered the respondent to be a significant risk to public safety between 1994, when it had recommended an absolute discharge, and

1999. In the court's view, the Board had wrongly shifted the focus from the protection of the public to the prevention of the respondent's abuse of alcohol and illegal drugs. It concluded that the evidence before the Board fell short of establishing that the respondent was a significant threat to the safety of the public, even when he was using drugs. The court therefore ordered an absolute discharge.

III. Relevant Statutory Provisions

20 The relevant provisions of the *Criminal Code* are attached as Appendix A.

IV. Analysis

21 At what point should an individual who has been found not criminally responsible for murder on account of mental disorder related to substance abuse, and who refuses to control his habit, be given an absolute discharge to return without restriction to the community? The individual in this case says he was entitled to an absolute discharge at least by May 1998 and, as stated, the Ontario Court of Appeal agreed with him.

22 An individual who is found to have committed a criminal act or omission under the influence of a mental disorder is not acquitted. Rather, if it is concluded that the mental disorder impaired his or her capacity at the time of the offence to appreciate the nature and quality of what was done or omitted, or of knowing that it was wrong, he or she must be adjudged by the court to be "not criminally responsible [NCR] on account of mental disorder" (*Cr. C.*, ss. 16(1) and 672.34).

23 There is no presumption that an NCR individual is a danger to the safety of the public: *Winko*, *supra*, at para. 46. On the contrary, the *Criminal Code* requires that persons found NCR be granted an absolute discharge unless the court or a Review Board is able to conclude that the individual poses a significant risk to the safety of the public. Even when this risk is established, the disposition is to be "the least onerous and least restrictive to the accused" consistent with the level of risk posed, i.e., ranging from detention "in custody in a hospital" to discharge "subject to such conditions as the court or Review Board considers appropriate" (*Cr. C.*, s. 672.54).

24 The disposition of a Review Board is subject to appeal to the appellate courts based on "a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice" (*Cr. C.*, s. 672.73(1)).

25 It is of central importance to the constitutional validity of this statutory arrangement that the individual, who by definition did not at the time of the offence appreciate what he or she was doing, or that it was wrong, be confined only for reasons of public protection, not punishment (*Winko*, *supra*, at paras. 41 and 71, and *R. v. Swain*, [1991] 1 S.C.R. 933). In this case, the respondent contends that he is being punished not only for the index offence, but also for his drug habit and his failure to cooperate with the hospital authorities in dealing with it over the years 1978 to 2000.

A. *Justification for Continued Confinement*

26 Once a detention order is made, the task of monitoring whether an NCR individual *continues* to constitute a significant threat to the safety of the public is given to the Board which is required to hold a hearing to review the status of each NCR individual no less frequently than every 12 months (*Cr. C.*, s. 672.81(1)).

27 The Board must be satisfied that, at the time of the hearing, the evidence demonstrates that the NCR individual constitutes such a threat. "If, at the end of the day, the court or Review Board cannot so conclude, the legal justification for confinement is absent and the NCR [individual] must be released" (*Winko*, *supra*, at para. 51).

28 The difficulty, of course, is that the Board is inevitably required to make its expert assessment on limited data. Here, the respondent has been under state supervision of varying degrees of intensity for over 20 years. How the respondent would behave if state supervision were removed by an absolute discharge necessarily involves an element of prediction. The Board is required to focus on his present mental state, but the appropriateness of its assessment in practice will, to some extent, depend on future events. In the present case, the major complicating factors, in the Board's opinion, were the respondent's history of violence, his continuing drug problem, the link between his use of hard drugs and the 1978 murder, and his apparent unwillingness to bring his drug habit under control.

B. *The Review Board's Expertise*

29 To make these difficult assessments of mental disorders and attendant safety risks, the Board is provided with expert membership and broad inquisitorial powers. While the chairperson is to be a federally appointed judge, or someone qualified for such an appointment, at least one of the minimum of five members must be a qualified psychiatrist. If only one member is so qualified, at least

one other member must "have training and experience in the field of mental health", and be entitled to practise medicine or psychology (*Cr. C.*, ss. 672.39 and 672.4). The chairperson has all the powers conferred under ss. 4 and 5 of the *Inquiries Act*, R.S.C. 1985, c. I-11, and a broad authority to consider "disposition information" that may not in all respects comply with strict rules of evidence (*Cr. C.*, ss. 672.43 and 672.51).

30 It is evident that the assessment of whether the respondent's mental condition renders him a significant threat to the safety of the public calls for significant expertise.

C. *The Standard of Review*

31 The appellant submitted an extensive analysis of the Court's administrative law jurisprudence applying the "functional and pragmatic test" to establish the appropriate standard of review from *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087, to *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11. However, in the case of these review boards, Parliament has spelled out in the *Criminal Code* the precise standard of judicial review, namely that the court may set aside an order of the review board only where it is of the opinion that:

> (a) the decision is unreasonable or cannot be supported by the evidence; or,
>
> (b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or
>
> (c) there was a miscarriage of justice. (*Cr. C.*, s. 672.78)

32 It must be kept in mind that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": *Bibeault*, at p. 1087 (emphasis deleted). Where Parliament has shown its intent in the sort of express language found in s. 672.78 *Cr. C.* then, absent any constitutional challenge, that is the standard of review that is to be applied.

33 The first branch of the test corresponds with what the courts call the standard of review of reasonableness *simpliciter*, i.e., the Court of Appeal should ask itself whether the Board's risk

assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. If the Board's decision is such that it could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene.

34 The Crown asks us to apply the test of "unreasonable verdict" in criminal cases, citing *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15. There are parallels between the language of s. 672.78 *Cr. C.* dealing with appellate review of an NCR disposition order, and s. 686 *Cr. C.* dealing with appellate review of verdicts in criminal cases, and there is authority for that proposition: see *Peckham v. Ontario (Attorney-General)* (1994), 93 C.C.C. (3d) 443 (Ont. C.A.), at p. 454. However, with respect, we should be mindful of the differences in context, regardless of the similarity in the wording of the statutory provisions. An NCR disposition order is not punitive: *Winko*, *supra*, at paras. 41 and 71. It arises out of a process that is inquisitional, not adversarial, that takes place before an administrative board, not a court. To the extent the Crown seeks to raise the bar of judicial review higher than reasonableness *simpliciter*, I think the attempt should be resisted. An NCR disposition order is to be reviewed on the basis of administrative law principles. Resort must therefore be taken to the jurisprudence governing judicial review on a standard of reasonableness *simpliciter*, as most recently discussed in *Dr. Q*, *supra*, at para. 39, and *Ryan*, *supra*, at para. 47.

35 The appellant next contends that, notwithstanding its notional acceptance of the reasonableness *simpliciter* test, the Court of Appeal in reality substituted its own view for that of the Board, thus in fact applying the least deferential standard of review, namely correctness. I do not agree.

36 The Court of Appeal referred, at para. 17, to its own previous decision in *Beauchamp v. Penetanguishene Mental Health Centre (Administrator)* (1999), 138 C.C.C. (3d) 172, at p. 180, where Osborne A.C.J.O. stated that the court's review of a disposition "is not a review of the correctness of findings made in the disposition" (emphasis added). See also *Penetanguishene Mental Health Centre v. Ontario (Attorney General)* (1999), 131 C.C.C. (3d) 473 (Ont. C.A.), at para. 8, leave to appeal refused, *sub nom. Clement v. Attorney General for Ontario*, [1999] 1 S.C.R. vi.

37 Moreover, the court in this case expressly acknowledged the Board's "medical expertise, its specialized knowledge and its advantage in observing witnesses" (para. 18). These factors, as the court itself explicitly recognized, command deference. The court concluded that it ought nevertheless to intervene because, in its view, the decision appealed from was unreasonable and could not be supported by the evidence. Although the court did not use the term "reasonableness *simpliciter*", I think it is clear from the decision as a whole that this is the standard of review applied by the court and it was correct to do so.

D. *Was the Review Board Decision Unreasonable?*

38 The Court of Appeal accepted the Board's conclusion that the respondent "continues to suffer from an anti-social personality disorder exacerbated by substance abuse" (para. 20). Such an assessment was within the Board's expertise and the court saw "no basis on which this court can properly interfere with it" (para. 20).

39 The paranoid psychotic state in which the murder had been committed in 1978, triggered by amphetamine abuse, had apparently subsided. However, while the evidence suggests the respondent was not suffering in 1999 from a "mental disorder" (emphasis added) as required by *Cr. C.* ss. 16 and 672.34 to qualify initially for NCR status, the Board in making subsequent dispositions is required by s. 672.54 to have regard to the NCR person's "mental condition" (emphasis added), which is a term of broader scope, and which in the respondent's case was certainly a relevant consideration for the Board in the spring of 2000. As McLachlin J., as she then was, pointed out in *Winko*, *supra*, at para. 40:

> Public safety will only be ensured by stabilizing the mental condition of dangerous NCR accused.

40 However, the Court of Appeal concluded that the evidence "fell short of establishing that the appellant is a significant threat to the safety of the public, even when using drugs" (para. 29). I entirely accept that the court should be vigilant in protecting the liberty of persons detained under the NCR provisions of the *Criminal Code*, but this vigilance must be tempered with recognition of the inherent difficulty of the subject matter and the expertise of the medical reviewers. As stated in *Winko*, *supra*, at para. 61:

> Appellate courts reviewing the dispositions made by a court or Review Board should bear in mind the broad range of these inquiries, the familiarity with the situation of the specific NCR accused that the lower tribunals possess, and the difficulty of assessing whether a given individual poses a "significant threat" to public safety.

41 The Court of Appeal accepted the respondent's argument that the Board had wrongly "shifted the focus from the protection of the public to the prevention of the appellant's abuse of alcohol and illegal drugs. It exercised its power to make a disposition for a punitive purpose . . ." (para. 29). But of course in the hospital's view, the drugs, the violence and the mental condition were inextricably

linked. Thus, in a March 25, 1999 report to the Board, the hospital stated:

> The team is of the opinion that [the respondent] continues to represent a risk to the safety of the public. The consensus is that although his desire to raise his son is a motivator for good behaviour, it is also the restrictions imposed by the existence of his Disposition Order that play a key role. If such controls were removed, it is the opinion of the team that [the respondent] may well encounter difficulties, and perhaps a relapse of his mental illness. [Emphasis added.]

42 The Court of Appeal for Ontario pointed out that from 1994 to 1996 the respondent had been granted conditional discharges. In 2000, of course, the Board was required to deal with the respondent's situation as it found it to be in 2000. The various hospital recommendations from 1994 to 1999 were made at a time when the hospital mistakenly believed that the respondent was undertaking successful steps to control the substance abuse that, in its view, had been the catalyst for earlier acts of violence. The hospital recommendation changed in 2000 because its understanding of the material facts had changed. In particular, the respondent tested positive for cocaine. Dr. Michael Chan, the respondent's attending physician at the KPH, reminded the Board members that before the murder in 1978 the respondent had eaten an apple spiked with methamphetamine (an amphetamine). Amphetamines and cocaine are pharmacologically similar. Thus, in Dr. Chan's view, the respondent's refusal or inability to control his drug habit, which had led to violence in the past, created a significant *present* risk to the safety of the public:

> Q. What is it about the cocaine test which came back positive on January 25 [2000] that causes the report to describe it as "most troubling?"
>
> A. Cocaine is pharmacologically very similar to amphetamine and, indeed, they're classified — both, as stimulants. And the pharmacological effects in the short term and the long term are very similar. And both substances can produce, with long usage, a paranoid psychotic state.
>
> . . .
>
> **MR. L. STEACY** [Review Board Member]: And is it your concern today that because this gentleman is using drugs that that potential is still there for a similar type of action, or recidivism?

DR. M. CHAN: Yes.

MR. STEACY: And is that why you are telling the Board he constitutes a significant risk to the safety of the public today?

DR. M. CHAN: Yes.

Dr. Chan further testified that the respondent would not acknowledge the effect of drugs on his state of mind at the time of the index murder, thus making the condition harder to treat:

Q. . . . does [the respondent] acknowledge that there was any complicity of substance in the index murder?

A. A'hm — on a good day he might acknowledge he was taking amphetamines around the time of the offence. But on a bad day he would say amphetamines have nothing to do with it.

. . . abuse of amphetamines — drugs — were ongoing and were a large part in producing a paranoid psychotic state.

43 The Board had before it considerable evidence of violent behaviour, or the serious threat thereof, related to substance abuse. First and foremost, there was the 1978 murder. In 1988, he was convicted of possession of a prohibited weapon. In 1989, he hit a car door in such rage that he broke his hand: "It was either the door or Brad's jaw, man, I had to hit something." A year later, he did in fact fracture a man's jaw with a pool cue. In 1991, he again exhibited "assaultive behaviours" and thereafter the KPH reports continued to note a propensity for violence. Reference has already been made to the hospital summary reports for the years 1991 to 1999. Most significantly, because most recently, we have the year 2000 nursing records (which are the subject of the fresh evidence application), which include his threat on September 26, 2000 to another patient, "You fucking bastard. Come to my room one more time and I will kill you. See those fucking cameras. They mean shit to me. I will kill you. I haven't killed in 20 years but I'll do it again." This is not the language of someone who has his propensity for violence under control.

44 In its reasons, however, the Board did not attach so much importance to incidents of threats or violence which may have occurred in the years 1991 to 1999 as it did to the fact that in 2000 the respondent "has resumed the use of cocaine, drugs similar to that psychosis which preceded the events described at the time of the index offence", i.e., the 1978 murder, and the "very serious assault . . . in 1990". Accordingly, the respondent's

> recent conduct in graduating from marijuana use to cocaine, combined with his failure to assume any responsibility for his actions, demonstrates a total disregard of the nature and extent of the risk that he poses to the public. [The respondent] has no understanding of his illness nor appreciation of its likely consequences and, as a result, remains a significant threat to the safety of the public. [Emphasis added.]

45 As stated, the Court of Appeal accepted the Board's diagnosis that the respondent "continues to suffer from an anti-social personality disorder exacerbated by substance abuse" (para. 20). In these circumstances, with respect, it was not unreasonable for the Board to conclude that the respondent's demonstrated capacity for violence when taking amphetamines or cocaine, now linked to recent evidence of resumed use of cocaine, rendered him a significant threat to the safety of the public. It is possible, as my colleague Justice Arbour shows, to take a different view of the facts but, with respect, the Board's decision was within a reasonable range of outcomes: *Ryan*, *supra*, at para. 56.

46 The Review Board's mandate was to focus on the overall "mental condition" of the respondent as of the date of the hearing as well as "the need to protect the public from dangerous persons, . . . the reintegration of the accused into society and the other needs of the accused" (*Cr. C.*, s. 672.54). In my view, with respect, the decision of the Board meets the standard of reasonableness discussed in *Southam*, *supra*, *per* Iacobucci J., at para. 56:

> . . . a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

47 Here, the "logical process" by which the Board sought to draw its conclusion from the resumed use of cocaine was squarely within its expertise. The Court of Appeal, as stated, was of the view that the evidence "fell short" in this regard but, with respect, that was a matter of expertise and weight for the Board, not the reviewing court.

E. *Admission of Fresh Evidence*

48 An appeal against a disposition order shall be "based on a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice" (emphasis added) (*Cr. C.*, s. 672.73(1)). The term "the interests of justice" also appears in the catalogue of powers of a court of appeal to admit fresh evidence in criminal appeals (*Cr. C.*, s. 683(1)).

49 The respondent says it is not clear whether the Court of Appeal accepted or rejected the fresh evidence because it made no order either way. However, it seems clear that the fresh evidence application was rejected because (i) there is no order allowing it, (ii) there is no reference in the court's reasons to any of the information contained in the fresh evidence, and (iii) at para. 37 of its reasons, the Court of Appeal concludes that on the basis of the "evidence before it, the Board could not properly conclude that the appellant posed a significant threat to public safety" (emphasis added), and immediately thereafter in para. 38 it allowed the appeal without further discussion.

50 The Court of Appeal gave no reason for its rejection of the fresh evidence in this case and we are therefore left to speculate about why it was considered "in the interests of justice" not to admit it. The respondent seeks to rationalize the *sub silentio* rejection by reference to the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, which sets out the following conditions:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

51 Counsel for the respondent concedes that the "fresh evidence" could not with due diligence have been adduced at the original hearing (as the events it describes postdate the hearing) and was relevant to the issue of the respondent's alleged propensity for violence, but he argues that it was nevertheless rightly rejected because it largely consisted of "unreliable" nursing notes and hospital records. Such evidence, he says, could not be expected to have affected the result before the Board (which had already concluded that the respondent was a significant risk to public safety) or the result in the Court of Appeal, which was leaning in favour of allowing the appeal, because what little probative value the fresh evidence possessed was outweighed by its obvious prejudice.

52 I do not accept this analysis. In the first place, the term "interests of justice" used in s. 672.73(1) and s. 683(1) *Cr. C.* takes its meaning from the context in which it is sought to be applied. While there are some generally applicable considerations, such as the public interest in bringing finality to litigation, and avoiding the relitigation of issues in the Court of Appeal on a different record than was before the trial court, there are also differences. The appeal of an NCR disposition order under Part XX.1 of the *Criminal Code* is not an appeal in an adversarial criminal prosecution (as in *Palmer*, *supra*, and *R. v. Stolar*, [1988] 1 S.C.R. 480) but an inquisitional administrative procedure designed to arrive at the least restrictive regime for an NCR detainee consistent with public safety. As Goldie J.A. wrote in *Davidson v. British Columbia (Attorney-General)* (1993), 87 C.C.C. (3d) 269 (B.C.C.A.), at p. 277, "[u]nder s. 672.54 of the *Code*, the treatment of one unable to judge right from wrong is intended to cure the defect. It is not penal in purpose or effect. Where custody is imposed on such a person, the purpose is prevention of antisocial acts, not retribution."

53 Even in the adversarial context of a criminal appeal, the test is not a mechanical application of the *Palmer* criteria but the statutory test of "the interests of justice". Thus in *R. v. Warsing*, [1998] 3 S.C.R. 579, the Court held that "failure to meet the due diligence requirement should not 'override accomplishing a just result'" (para. 56).

54 In this context, the "interests of justice" includes not only justice to the NCR detainee, whose liberty is at stake, but also justice to the public, whose protection is sought to be assured. In light of the Court of Appeal's criticism that the Board had unduly concerned itself with the respondent's failure to control his drug habit without sufficient evidence of a continuing disposition to violent behaviour, the proffered evidence (including physical assaults and a recent death threat) was highly relevant.

55 If I had agreed with the Court of Appeal about the thinness of the record on the propensity for violence issue, I would think it all the more "in the interests of justice" to look at the latest reliable information on that issue.

56 Yet a different context (and a different statute) for the admission of fresh evidence is illustrated by *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32, released concurrently. In that case, the appellant, an attending physician, sought to introduce fresh evidence of his patient's mental condition in order to obtain consent of a substitute decision-maker to unwanted medical treatment under the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A, which permits the court to "receive new or additional evidence as it considers just" (s. 80(9)). We concluded in that case that reception of the proffered evidence would not be "just". Unlike here, no issue of public safety was raised. Here, an absolute discharge of the NCR detainee would, for all practical purposes, terminate the state's capacity to supervise and monitor the respondent's mental condition under Part XX.1 of the *Criminal Code*. Under the substituted consent provisions of the *Health Care Consent Act, 1996*, on the other hand, the attending physician can always reapply to the Capacity and Consent Board based on up-to-date information. In short, the consequences of a misjudged denial of state intervention are much more serious in the case of an NCR detainee than in the case of a patient resisting unwanted medical treatment. The interests of justice in the circumstances of this case require a different result.

57 The proffered evidence went to the core of the Court of Appeal's concern about the insufficiency of evidence of the respondent's continuing propensity for violence and, if credible, ought to have been admitted as "bear[ing] on a decisive issue" (*Palmer*, at p. 776).

58 The evidence was credible. Nursing notes and hospital records have routinely been admitted for more than 30 years as *prima facie* proof of the truth of their contents under the hearsay exception for business records: *Ares v. Venner*, [1970] S.C.R. 608, *per* Hall J., at p. 626:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.

59 Under more recent jurisprudence, such business records would be admissible on a principled basis under the hearsay analysis adopted in *R. v. Khan*, [1990] 2 S.C.R. 531. If the respondent wished to contest the accuracy of the hospital records, it was open to him to do so, but he chose not to: *R. v. Lévesque*, [2000] 2 S.C.R. 487, 2000 SCC 47, at paras. 26-28. An absolute discharge, in my view, should be granted only upon consideration of all of the reliable evidence available both at the time of the Board hearing and, if appealed, at the time of the appellate review.

60 I should add that the absence of any reasons from the Court of Appeal for its rejection of the fresh evidence motion has complicated the conduct of this appeal. Both the respondent and the Crown were obliged to speculate about what the Court of Appeal decided and the possible reasons for it. Acceptance or rejection of a fresh evidence motion may have a dispositive impact on the outcome of an appeal. To paraphrase *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 28, if the

deficiencies in the reasons of an intermediate appellate court prevent meaningful appellate review of the correctness of its decision in this Court, then an error of law has been committed. Reviewing courts should provide reasons for their decision to admit or reject fresh evidence pursuant to their mandate under s. 672.54 and s. 672.73(1) *Cr. C.* if justice is to be done to both the NCR detainee and the public.

61 In any event, it is my view that the fresh evidence ought to be admitted as part of the record on this appeal.

F. *The "Least Onerous and Least Restrictive" Disposition*

62 Having thus affirmed as reasonable the Board's conclusion that the respondent continues to be a significant threat to the safety of the public, I turn to the issue, under s. 672.54, whether the Board's disposition order is the least onerous and least restrictive for the respondent consistent with the assurance of public safety. In considering its order, the Board must again have regard to

> the need to protect the public from dangerous persons, the mental condition of the [NCR] accused, the reintegration of the [NCR] accused into society and the other needs of the [NCR] accused. . . .
>
> (*Cr. C.*, s. 672.54; *Winko*, *supra*, at para. 62)

63 As mentioned, from 1994 to 1996, the respondent was granted conditional discharge orders. This was changed in 1997 because of drug use. A detention order with leave conditions was substituted. That detention order was continued in 1998 and 1999. In 2000, the "leave conditions" were made more restrictive because of the discovery, on January 25, 2000, that the respondent was on cocaine. At that point, in making its recommendation, the hospital staff told the Board that:

> In the presence of close supervision [the respondent] consumed illicit substances. In the absence of direct supervision at all times, the hospital is not confident in its ability to prevent [the respondent] from engaging in these risky behaviours. [Emphasis added.]

Accordingly, in KPH's view, given the link it had made between the respondent's propensity for violence and the use of cocaine, the hospital detention order with restricted leave conditions represented

"the least onerous and restrictive, in keeping with the need to protect the safety of the public".

64 The success or failure of an NCR detainee to follow a treatment program was noted as a relevant factor in *Winko*, *supra*, at para. 61.

65 The respondent says that if he were to re-offend while on drugs, he would be subject, like anyone else, to the strictures of the *Criminal Code*. But he is not like anyone else. He is an NCR detainee whose drug abuse is linked to a demonstrated propensity for violence, including murder, and Part XX.1 of the *Criminal Code* is designed to take measures to protect the public safety *before* violence occurs, not (as in the ordinary case) to punish the offender afterwards.

66 In making its disposition order, the Board noted that it was required to consider "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused . . ." (*Cr. C.*, s. 672.54).

67 Reference has already been made to the Board's discussion of the respondent's mental condition and the repeated efforts of the hospital authorities to help reintegrate the respondent into society. The Board was clearly sympathetic to the respondent's desire to be reunited with his son and his evident level of frustration at his continued detention. The critical factor that tilted the Board against a less restrictive order was the respondent's renewed (or rediscovered) taking of cocaine, and its pharmacological link to the amphetamines that triggered the 1978 murder. This discovery led the hospital authorities to recommend against a conditional release:

> In the absence of direct supervision at all times, the team is not confident in its ability to prevent [the respondent] from engaging in high risk behaviour which may significantly increase the likelihood of recidivism.

68 The Board agreed with the hospital that there was little prospect of the respondent's drug habit being effectively controlled with the sort of sporadic supervision available in the community. The Board recognized the ease with which the respondent had deceived its drug monitoring program in the past. In light of the connection between the respondent's violence and the newly discovered cocaine abuse, the Board concluded:

> It is unfortunate that [the respondent] has chosen to retard his progress toward

> rehabilitation and thwart the efforts of his caregivers to return him to society. We note that as recent as August of 1999 the treatment team were prepared to support his transfer to the Chatham area, which remains [the respondent's] desired relocation. [The respondent] by his conduct is the agent of his own misfortune, albeit he is unlikely to recognize or appreciate his role in what he will undoubtedly determine to be punishment by the Review Board and the hospital.

69 I do not think it unreasonable for the Board to conclude, in light of the difficulty in monitoring the cocaine problem in the community, that the "least onerous and least restrictive" order for the time being was a detention order in KPH. The respondent's case is not an easy one, but once we affirm as reasonable the Board's finding that the respondent represents a "significant threat to the safety of the public" (*Cr. C.*, s. 672.54), we should not be too quick to overturn the Board's expert opinion about how that risk is to be managed. In this respect, as well, the fresh evidence of violent behaviour must be taken into account "in the interests of justice". Once the cocaine use by the respondent is under control, no doubt, a less restrictive order will be considered. Modified leave conditions might include a more closely monitored testing procedure in the community than was in place prior to 2000. However, it is not for the Court to micromanage the leave conditions and, as matters stand, I do not consider it unreasonable for the Board to have concluded that its disposition was the least onerous and least restrictive alternative, given the continuing use of cocaine and the consequent risk to society posed by the respondent.

V. Conclusion

70 In my view, the order of the Board dated May 17, 2000 was not unreasonable on the evidence before it. It is not enough for the respondent to suggest that other members of other review boards might have taken a different view of Dr. Chan's evidence, or its medical underpinning, or the significance of the respondent's freshly disclosed continuing drug habit, including cocaine. The Court of Appeal re-weighed the evidence and found it wanting, but that assessment was for the Board to make, and the decision they made was reasonably open to them on the evidence.

71 Even if I were persuaded, as was the Court of Appeal, that the "evidence before the Board fell short of establishing that the appellant is a significant threat to the safety of the public, even when using drugs" (para. 29), I would nevertheless allow the appeal on the basis of the record as enlarged by the fresh evidence. In my view, it will generally be desirable for an appellate court to admit fresh evidence that is trustworthy and touches on the issue of risk to public safety as being "necessary . . . in the interests of justice" (*Cr. C.*, s. 672.73(1)). The NCR detainee should, of course, be given the opportunity of countering the fresh evidence of risk by cross-examination or filing additional evidence in response. In the end, however, the Crown has the onus of establishing a significant risk to public safety and, in the interest of public safety, it should be given every reasonable opportunity to do so.

72 The confinement of the respondent will, of course, be subject to ongoing review by the Board no less than once every 12 months. The disposition of this appeal does not therefore purport to address, let alone decide, whether at the present time the respondent still poses a significant threat to the safety of the public. We decide only that the Court of Appeal was wrong to set aside the Board's disposition order of May 17, 2000.

VI. Disposition

73 The fresh evidence is admitted. The appeal is allowed. The decision of the Court of Appeal is set aside, and the order of the Review Board dated May 17, 2000 is reinstated.

The following are the reasons delivered by

74 ARBOUR J. (dissenting) — The Court of Appeal overturned a detention order made by the Ontario Review Board ("Board") under the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, dealing with persons not criminally responsible ("NCR") by reason of mental disorder. I agree with the Court of Appeal that the ruling of the Board was unreasonable for two reasons. First, the Board made an unreasonable finding regarding the dangerousness of the respondent, and second, the Board imposed the most onerous and restrictive disposition without any consideration of whether less restrictive ones would be adequate. The latter represents also an error of law since s. 672.54 specifically requires the Board to impose the least onerous and the least restrictive disposition that would achieve the desired result.

I. The Facts

75 My colleague Justice Binnie has referred to the salient facts. I will highlight what I consider significant.

76 The respondent was found not guilty of murder in 1978 by reason of mental disorder. The diagnosis at the time was of a drug-induced psychosis, which has now been in remission for many years. At the time of the hearing, the respondent did not suffer from any major mental illness, nor had he been suffering from such for a long time. However he had been a regular consumer of alcohol and drugs, although he tried to hide his consumption by cheating on his required urine tests. The respondent suffers from an antisocial personality disorder which is exacerbated by substance abuse.

77 Immediately after his trial in 1978, the respondent was detained at the Penetanguishene Mental Health Centre where he remained more or less continuously until 1986. From then on, he was granted increased access to community living until 1990, when he was convicted of assault causing bodily harm for hitting a man with a pool cue, fracturing his jaw. The respondent was sentenced to 14 months' imprisonment for this offence, with two years' probation. The respondent had been drinking heavily at the time of the commission of this offence and according to one of the hospital records, when Mr. Owen was interviewed in jail shortly after his arrest "he stated that he had been using marijuana and a bunch of stuff for two or three weeks before his arrest". There is however no evidence that he was under the influence of amphetamines or other similar drugs or that he was not criminally responsible for that assault by reason of a mental disorder. When he was released from jail, the respondent was examined by a psychiatrist who concluded that Mr. Owen was not depressed, showed no evidence of anxiety, had no disorder of thought or speech and demonstrated no evidence of hallucinations or delusional thinking. Although he remained under the NCR *Criminal Code* regime since he had not been absolutely discharged from the original detention order of 1978, the respondent served his sentence in jail. He was subsequently transferred to Kingston Psychiatric Hospital ("KPH") and the subject of further reviews by the Board.

78 The hospital reports throughout the 1990s consistently note Mr. Owen's history of substance abuse as well as his inability or unwillingness to admit that he has a substance abuse problem.

79 In 1994, the Board ordered Mr. Owen's conditional discharge, and did so again in 1995 and 1996. In 1997, after a positive test for cannabis, at the hospital recommendation the Board imposed a custodial order with terms allowing the respondent to live in the community at the hospital's discretion. The Review Board made similar orders in 1998 and 1999. It is interesting to note what triggered the change in the hospital's recommendation to the Board from conditional discharge to a detention order with discretion to release. There appears to be little difference between the two. In both cases the respondent is allowed to live in the community and has to report to KPH periodically. However, the hospital considered that as a matter of administrative convenience, it had more flexibility if a detention order was in place. This is explained in the KPH report to the Board of April 1997 as follows:

> Mr. Owen has, once again, demonstrated that he is unlikely to refrain from petty criminal behaviour, or legal behaviour yet prohibited to him, over the longer-term. He has acknowledged this to the Board in previous hearings and history would appear to confirm it. However, in the hospital's opinion, Mr. Owen has, otherwise, managed reasonably well in the face of major medical, social, financial and domestic difficulties. Throughout these past several years, there has been no evidence of criminal behaviour which has resulted in the victimization of anyone. Indeed, Mr. Owen, with his c/l wife (herself suffering from a major mental illness), has made a reasonable job of raising a small son and living peacefully in the community with extremely limited resources. Despite occasional opposition, the hospital sees itself as playing an ongoing and important role in this exercise.

> The hospital considers it unfortunate that it has not, on this occasion and others, had available a custodial disposition which would have provided the hospital with authority to act pro-actively in the face of obviously mounting difficulties in the Owen household. The occasion of such mounting difficulties culminating in consumption of prohibited substances is entirely predictable in this case. It has happened now on several occasions in the past and will happen in the future. On each such occasion, when the hospital is unable to require either hospital admission or significant changes in supervision, the community is placed at risk. The community would fail to appreciate why it is that KPH is unable to react quickly to known increases in risk. This situation is very likely to occur time and time again in the future. The role of the hospital should be to ensure that it is managed in a timely manner, consistent with the long-term rehabilitation needs of Mr. Owen and not contrary to the safety of the public. The hospital sees no useful purpose in a several month hospitalization every time this happens while Mr. Owen awaits the pleasure of the Board. Indeed, the results of the current administrative arrangement — a Conditional Discharge Order — are contrary to the rehabilitation needs of Mr. Owen and do nothing to protect the public.

80 It is clear from the above that the hospital considered, and the Board agreed, that an apparently more onerous and more restrictive disposition (a detention order rather than conditional discharge) was nevertheless appropriate but not because the respondent was a higher threat to the public. In fact, quite the opposite appears to have been the case. The hospital detention order was put in place in order to facilitate an earlier release of the respondent into the community by the hospital after a breach of condition than was possible under a conditional release order, where the respondent could only be released again by the Board and would have to await a hearing.

81 In August 1999, while under a hospital detention order, the respondent was charged with impaired driving and readmitted shortly thereafter to the hospital as an inpatient. Two months later, he resumed community living.

82 In January 2000, he tested positive for cannabis and cocaine. He admitted to ongoing use of alcohol and marijuana (although he denied using cocaine), and to substituting urine in earlier tests to avoid detection. He stated that he had no intention to abstain from the use of alcohol and drugs.

83 As the above demonstrates, the respondent has not exhibited psychotic symptoms nor the symptoms of any other major mental illness since the period of time immediately surrounding the commission in 1978 of the offence for which he was found not guilty by reason of a mental disorder ("index offence"). During that period of time, the respondent has been in conflict with the law on several occasions. The respondent has also shown, and has expressed, frustration for being detained within the NCR system. A KPH document referring to the period July 1991 to January 1992 contains the following entry:

> Mr. Owen suffers from serious coronary heart disease and has been investigated extensively for this. He has a past history of heart attacks and had been taking a betablocker and Isordil. However, in December 1991 he began to refuse these medications as a way of expressing his feelings of frustration at being in the system.
>
> Mr. Owen has, on the whole, found his time in our service frustrating because of the severe restrictions on his freedom. Essentially, his Warrant confines him to Medium Security with no off-ward privileges. This has been in response to his recent history of re-offending. Mr. Owen has a very clear philosophy of facing consequences for his actions and prefers that this be time-limited as would be the case in the criminal justice system. He finds the uncertainty of the WLG system quite stressful. He could not reassure us that whenever he is released in the community, there would be no incident. He did say that he would expect to face any consequences that went along with unlawful acts. Thus he appears very frustrated and angry with the way that his life has shaped up in a Medium Secure Unit and wishes to pursue accelerating the movement towards the community so that he could establish closer links and live with his girlfriend and her young child. [Emphasis added.]

84 In anticipation of a July 1993 Board hearing, the hospital wrote again:

> Mr. Owen feels that much of his problematic behaviour over the past several years in the "W.L.G." system have been as a result of his difficulties in dealing with the frustrations of being detained for so long in a system which is designed to deal with major mental health problems, when he has none. He observes that whenever he has broken the law, for example by absconding, he has been dealt with in the criminal justice system and that none of his behaviour over the past several years has been seen as arising out of mental disorder. He observes that whereas the existence of a mental illness is necessary to enter into this system, the absence of a mental illness appears to carry little or no weight in being removed from it. He denies that he represents a significant danger to the public.

. . .

> The hospital does not see Mr. Owen as suffering from a major mental illness and is of the view that he is fully in control of his behaviour. The need for secure placement arises solely as a result of Mr. Owen's high risk for elopement and the need to manage this type of risk in the context of Disposition Orders requiring custody. The hospital does not see this patient as representing a significant risk for violence in the community, if by "significant" is meant a higher probability of violent behaviour than expected of those persons living in the community to which Mr. Owen would return. Whereas it is acknowledged that Mr. Owen is at risk for future involvement with the criminal justice system in one way or another, it is proposed that the risk of this involvement arising out of violent behaviour is not significantly above the population average, particularly if abstention from drugs/alcohol is maintained. Mr. Owen would not currently be certifiable under the Mental Health Act as a danger to others, nor would he be a candidate for Mentally Disordered Dangerous Offender status in the event this section of the Criminal Code was implemented. Aside from addressing the possibility of ongoing drug/alcohol problems, there would appear to be little indication for currently available psychosocial treatments. [Emphasis added.]

85 As to the absence of mental illness, the hospital again noted in October 1994:

> Mr. Owen does not suffer from a major mental illness. He is not certifiable under the Mental Health Act and were it not for his status under the O.C.C.R.B. he would be free to leave this hospital unencumbered. It is highly likely that he would be found culpable for any criminal activity that he may be subsequently found to engage in. [First emphasis added; second emphasis in original.]

II. Statutory Provisions

86 I will not reproduce here all the relevant statutory provisions which are contained in Binnie J.'s reasons. I will simply reproduce, for my own purposes, ss. 672.78(1) and (3) and s. 686(1)(*a*) of the *Criminal Code*, to which I now turn in my analysis. I also add, for convenience's sake, ss. 672.81(1) and 672.82, which I will refer to below.

> **672.78** (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(*a*) it is unreasonable or cannot be supported by the evidence;

(*b*) it is based on a wrong decision on a question of law; or

(*c*) there was a miscarriage of justice.

. . .

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

(*a*) make any disposition under section 672.54 or any placement decision that the Review Board could have made;

(*b*) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or

(*c*) make any other order that justice requires.

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).

672.82 (1) A Review Board may hold a hearing to review any of its dispositions at any time, at the request of the accused or any other party.

(2) Where a party requests a review of a disposition under this section, the party is deemed to abandon any appeal against the disposition taken under section 672.72.

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

III. Analysis

A. *Standard of Review*

87 I agree that the applicable standard of review of the disposition by the Board is that of reasonableness *simpliciter*, largely for the reasons expressed by Binnie J. I would however point out that the use by Parliament of virtually identical language in ss. 672.78 and 686(1)(*a*)(i) creates the obvious anomaly that the same words in different sections of the same statute — the *Criminal Code* — mean something entirely different. While, as expressed by Binnie J., "unreasonable" in s. 672.78 means "unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination" (para. 33), the same expression in s. 686 means that no reasonable trier of fact, properly instructed and acting judicially could have convicted (see *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 36; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185). This, in my view, is akin to the standard of patent unreasonableness, rather than reasonableness *simpliciter*, as these standards are understood in administrative law.

88 In the end, despite this anomaly in Parliament's having used identical wording in different sections of the same statute to express different concepts, I am satisfied that the standard of review under s. 672.78 is that of reasonableness *simpliciter*. The similarity of language is deceptive in that there are important substantive differences between the two sections. In s. 686, an appellate court is reviewing the verdict of a court (composed of a judge alone or of a judge and jury) while under s. 672.78, the appellate review is that of a disposition by an administrative body. The difference is also well illustrated by the fact that the unreasonableness of a verdict is a question of law (*Biniaris*, *supra*) and when an appellate court concludes that a verdict of guilty is unreasonable, its only remedial power is to enter an acquittal. In contrast, in the case of appellate review under s. 672.78, in the face of an "unreasonable disposition", the Court of Appeal may allow the appeal and substitute its own disposition to that of the Board, or refer the matter back to it (s. 672.78(3)). For the reasons expressed by Binnie J., I agree that the functional and pragmatic approach must be applied to ascertain the applicable standard of review. Here, that approach indicates that a standard of patent unreasonableness would be unduly deferential to the Board and that reasonableness *simpliciter* is the proper one.

89 Having said that, I disagree with Binnie J. that the conclusion of the Board here was reasonable.

B. *Whether the Disposition by the Board Was Reasonable*

(1) The Finding of Dangerousness

90 We should keep in mind at the outset the purpose of Part XX.1 of the *Criminal Code*, as outlined by this Court in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 21:

> Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a special stream. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions, or unconditionally discharged. The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. [Emphasis added.]

91 The present case raises the issue of the extent and limits of the "special stream" designed

for mentally ill people. It is not a special stream that permits the perpetual detention of regular delinquents who have once committed a crime while suffering from a mental disorder. The commission of an "index offence" does place an individual within the NCR system, but there is no indication in the statutory scheme that the differential treatment of NCR accused and members of the general population is meant to be indefinite — in fact, the opposite is clearly the case. *Winko*, *supra*, establishes that the threshold determination for taking an individual out of the NCR system is the determination of significant threat to the community. That threat has to be assessed in light of several factors, including the mental condition of the accused.

92 The respondent has been, and may continue to be, in conflict with the law. He has been and most likely would continue to be answerable to the criminal justice system for such behaviour. He has committed a most serious offence for which he was held not criminally responsible as a result of his mental condition at the time. The question now is whether his mental condition and the threat he may pose to the public are such as to require his continued handling by the special stream created by Part XX.1 of the *Criminal Code*, which places emphasis on "achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately" (*Winko*, *supra*, at para. 21 (emphasis added)).

93 The Board did find that Mr. Owen suffers from a "serious antisocial personality disorder". On questioning, Dr. Chan explained this syndrome as follows:

> A. Okay – that's a personality syndrome characterized by a lifelong pattern of features such as: difficulty in sustaining long-term relationships; evading responsibility; indulging in behaviours for which they could be charged criminally; having problems with impulsivities; having difficulties with – sometimes it can overlap substance and alcohol abuse – I think – those would be the main features that come to mind.

94 While each of these personality attributes is clearly undesirable, the syndrome is not itself a mental illness but rather an assortment of symptoms which reflect poor adjustment to society. Dr. Chan confirmed this in cross-examination:

> Q. Okay – now originally the index offence is a drug-induced, paranoid psychotic state?
>
> A. That's correct, yes.

> Q. Is that a temporary and passing condition, or is that indicative of an underlying psychological problem, a mental illness, that is just exacerbated by drugs or alcohol?
>
> A. Okay – I don't think he has a predisposition to a schizophrenic illness. I don't think he has a schizophrenic illness. I think that if anyone uses stimulants long enough we will all become paranoid.
>
> So I think it will happen to anyone, regardless of our predisposition to a psychotic illness . . . so that's the way I would view his paranoid problem . . . . [Emphasis added.]

And later, on the respondent's consumption of alcohol:

> Q. . . . Is he more predisposed to that kind of violent behaviour [when using alcohol] because of an underlying mental illness?
>
> A. No, I don't think so – I wouldn't say "illness." I think it's a characteristic of the personality functioning, as well as the drug and alcohol abuse.

The key issue therefore in this case is whether after more than 20 years of increased community living while in the NCR system the circumstances of the respondent — his mental condition, his needs — had changed sufficiently in March 2000 to reasonably justify his detention with virtually no freedom. The hospital records indicate that the hospital was always aware that Mr. Owen had not abandoned, and more likely would not abandon, his alcohol and substance abuse habit.

95 Two things changed at the March 2000 hearing. The hospital uncovered traces of cocaine in Mr. Owen's urine. He also admitted that he had cheated in his urine testing in the past. Regarding the use of cocaine the Board said this: "Mr. Owen continues to suffer from a very serious antisocial personality disorder which in the past was complicated by a drug-induced psychosis and alcohol abuse resulting in the death of one person in 1978 and the very serious assault of another in 1990. . . . [He] has resumed the use of cocaine, drugs similar to that psychosis which preceded the events described at the time of the index offence" (emphasis added). As I indicated earlier, while there is evidence that the respondent had been drinking heavily at the time of the 1990 assault, there is no evidence that the respondent was in a drug-induced psychosis at that time. Had he been, he probably would have been found not criminally responsible by reason of a mental disorder as he had been at the time of the 1978

index offence.

96 What significance should then reasonably be placed on the discovery of traces of cocaine in the respondent's urine? A proper interpretation of the evidence as a whole does not in my view support the conclusion that there has been a recent resumption of cocaine intake on the part of the respondent, such as to make it likely that the conditions which were present when he committed the 1978 murder could repeat themselves for the first time some 20 years later. It is true that the respondent always denied cocaine use. On the other hand he admitted virtually uninterrupted drug use since his detention, except for the 18-month period preceding the birth of his son, and he was caught with traces of cocaine in his urine when he could not cheat on the test. It is not reasonable on this record to conclude that amphetamines were present in the 1978 murder (and also, clearly erroneously, in the 1990 assault), then absent, such that it justified the respondent's release from 1994 to 1999, then "resumed", such as to create this new dangerousness because of the similarities between the effects of cocaine and amphetamines.

97 In reality, it is more likely that the respondent was a constant abuser of drugs and alcohol throughout his detention under the supervision of the Board, and that he escaped some detection by deceit during much of that time. In the 22 years since the commission of the index offence, the respondent has never exhibited the kind of psychotic episode which led to the 1978 murder, despite his continuous drug use, and despite his periodic delinquency. The only proper inference to draw from that evidence was that the respondent had been relatively harmless for many years, not because he was drug free, but in spite of the fact that he continued throughout to abuse alcohol and drugs. To assume that he had not used cocaine or similar drugs since his consumption of methamphetamines in 1978, simply because he so asserts, is simply not plausible. In fact, it is hard to reconcile the fact that the Board used the test of January 25, 2000, which showed traces of cocaine, as a basis of its new assessment of dangerousness, thereby rejecting the respondent's denial that he used cocaine prior to the test, with the fact that the Board assumed, on the other hand, that the respondent suddenly resumed cocaine use, even despite the respondent's admission that he has deceived the hospital on previous urine tests.

98 The psychosis that led to the respondent's index offence was a temporary result of the ingestion of amphetamines, and Mr. Owen's dependence upon drugs (marijuana and, as he put it, "a bunch of stuff") and his alcoholism have not led to any violent behaviour in the preceding decade, and have not interfered with Mr. Owen doing "a reasonable job of raising a small son and living peacefully in the community with extremely limited resources".

99 In determining whether the accused is a significant threat to the safety of the public, the Board must consider all the factors listed in s. 672.54 which include not only the need to protect the public from dangerous persons, but also the mental condition of the accused, his reintegration into society and his other needs. If the mental condition of the accused is such that he no longer suffers from a mental disorder, his mental condition should not be confused with his propensity to commit crimes. In that respect, he should be treated no differently than anyone else: he should be answerable to criminal

sanctions.

100 What the mental disorder detention regime seeks to guard against is the repetition of dangerous conduct that a mentally disordered accused is likely to engage in and for which he would not be held responsible. As this Court outlined in *Winko*, at para. 57:

> To engage these provisions of the *Criminal Code*, the threat posed must be more than speculative in nature; it must be supported by evidence: *D.H. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 2011 (QL) (C.A.), at para 21. The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature. . . .

101 In my view the Court of Appeal was correct in concluding that the Board improperly punished the respondent for his successful deception regarding his drug habit. The Board seems to have accepted the risk assessment contained in the hospital administrator's report which it quotes as follows:

> **Risk Assessment:**
>
> Mr. Owen represents a significant risk to the safety of public. He has demonstrated that even with close controls he engages in behaviours that could potentially place members of the public at risk. The presence of cocaine is most troubling given its similar profile to amphetamine, which was implicated in his index offence and drug induced paranoid state.
>
> In the absence of direct supervision at all times, the team is not confident in its ability to prevent Mr. Owen from engaging in high risk behaviour which may significantly increase the likelihood of recidivism.

102 The Board then added its own appreciation of the changes in Mr. Owen's circumstances as follows:

> It is unfortunate that Mr. Owen has chosen to retard his progress toward rehabilitation and thwart the efforts of his caregivers to return him to society. We note that as recent as August of 1999 the treatment team were prepared to support his transfer to the Chatham area, which remains Mr. Owen's desired relocation. Mr. Owen by his conduct is the agent of his own misfortune, albeit he is unlikely to recognize or appreciate his role in what he will undoubtedly determine to be punishment by the Review Board and the hospital.

103 The problem with the reasoning of the hospital and of the Board is that if Mr. Owen is unable to conquer his addiction to drugs and alcohol — which seems likely — he will spend the remainder of his life in detention in a mental hospital, despite the fact that he does not suffer from a mental illness, has lived peacefully for ten years in the community raising his son, and would almost certainly be found criminally responsible if he ever committed another offence. A 1996 hospital report illustrates the problem created by using violations of conditions prohibiting substance use to justify detention within the NCR system. In that report, the hospital had invited "the Board to consider whether or not the order to abstain serves any useful purpose with regard to either the protection of the public, or the reintegration of Mr. Owen to society":

> It continues to be the opinion of the clinical team that Mr. Owen's history of alcohol and substance abuse, and his problem behaviours, have generally been linked in the past and will likely be linked in the future. For this reason, drug and alcohol consumption has been specifically identified as a risk factor and consumption has been prohibited under the Order. . . . Mr. Owen has consumed alcohol. He now indicates that he does not think it likely that he will ever manage total and unremitting abstention and will, therefore, never be able to 'get out from under' the Board's jurisdiction. . . .
>
> . . .
>
> With regard to the present case, this hospital is concerned that, during a period of conditional discharge, Mr. Owen is ordered to refrain from engaging in an activity which is legal for the general public. If, by complying with that Order, Mr. Owen remains of good behaviour, what is learned that could lead a Board to subsequently find that Mr. Owen is no longer a significant risk to the safety of the public, and discharge him absolutely? The hospital is concerned that the Board, under these circumstances, will never have before it evidence which would support a conclusion that Mr. Owen, in the absence of extraordinary controls, is not a significant threat to the safety of the public, unless he is given a conditional period of living subject only to the laws of the land, while ordered to be of good behaviour. Compliance with such an Order would, presumably, argue in favour of an absolute discharge. Failure would result in criminal sanctions and, possibly, a return to a custodial Disposition Order with, or without, discretionary authority to place the accused in the community with hospital controls. [Emphasis added.]

Justifying the respondent's detention within the NCR system by his continuous substance abuse problems is equivalent to imposing such a burden on the respondent so as to deny him the possibility of ever getting out of the system, despite a prolonged absence of any violent behaviour.

104 In my view, both the hospital officials and the members of the Board were unduly influenced by the recent discovery that Mr. Owen had regularly cheated on his drug and alcohol tests in the past. It had always been known that the respondent was likely to be engaging in substance abuse. To restrict the respondent's freedom severely after finding that he had deceived the hospital indicates that at its root the disposition was punitive in purpose. I agree with the Court of Appeal that the Board's assessment of the risk posed by the respondent was entirely speculative and not supported by a proper appreciation of the record.

(2) The Imposition of the Most Onerous Disposition

105 Section 672.54 requires the Board to consider several factors and, ultimately, to make the disposition that is "the least onerous and the least restrictive to the accused". The first option is to discharge the accused absolutely, provided that the Board finds that he is not a significant threat to the public. Should that not be appropriate, the Board may discharge the accused with conditions, or direct that the accused be detained in custody in hospital, subject to conditions that the Board judges appropriate.

106 The respondent had been in the NCR system for 22 years and had been the subject of 24 disposition or warrant orders when the Board rendered the decision under appeal. He did live in the community under different forms of supervision for extended periods of time commencing in 1986, and he resided full-time in the community from 1994 until this disposition was taken. Under this March 2000 disposition the respondent was ordered detained in hospital without entry into the community except under escort. This was the most restrictive disposition imposed upon him since 1990, after his conviction for assault and, apart from that one, the most restrictive since 1982. The Board ordered detention in hospital with only compassionate leave and staff-accompanied entry into the community. It gave no reason for its conclusion that this most restrictive disposition was "the least onerous and least restrictive" one. In my view this disposition constituted an error of law and was not reasonable.

107 Even on the assumption that the respondent constituted a sufficient threat to the community to preclude his absolute discharge, the Board was required to embark on an evaluation of all four of the factors outlined in s. 672.54 — the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the

accused — in order to determine whether a conditional discharge or a custodial order was the appropriate disposition. This could not adequately be done without considering that the respondent had lived in the community since 1994, that no violent incident occurred in a period of close to 10 years, the respondent's desire to be reunited with his son, and the fact that despite his failure to abstain from substance abuse he had nonetheless made some successful efforts in recent years to manage various stressors in his life. In my view, on the facts of this case it was unreasonable for the Board to conclude that the custodial disposition imposed was the least onerous disposition available in the circumstances in that it accorded the respondent "as much liberty as is compatible with public safety": *Winko*, *supra*, at para. 9.

C. *The Fresh Evidence Issue*

108 Section 672.73(1) of the *Code* permits the Court of Appeal to admit any evidence "that [it] finds necessary to admit in the interests of justice". The Court of Appeal did not deal with the application for admission of fresh evidence in its reasons. It leaves us to speculate to some extent as to the view that the Court of Appeal took of the matter. There is no question that the court looked at the proffered evidence. We do not know however, whether the court thought that the evidence was weak and inconclusive and therefore gave no effect to it, or whether it simply decided not to admit it, in which case we are asked to rule that this was an error.

109 This is not "fresh evidence" as contemplated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (i.e., pre-existing evidence that was not brought before the trial court (here the Board)). Under *R. v. Stolar*, [1988] 1 S.C.R. 480, for such evidence, the test of admissibility on appeal is high, but if received, the fresh evidence leads inevitably to a new trial (or a new hearing), save for the rare cases where the fresh evidence will be in itself so conclusive that the appeal court will be able to act on it and dispose of the case accordingly (this will often be done on consent: see, for instance, fresh DNA evidence that exonerates a convicted accused: *R. v. Morin* (1995), 37 C.R. (4th) 395 (Ont. C.A.)).

110 The evidence here was tendered under the *Code* "in the interests of justice". It obviously could not have affected the decision of the Board as it was post-disposition evidence. Evidence of post-sentence conduct is often tendered in sentence appeals as "update", to ensure that the decision of the Court of Appeal is not made in a vacuum. Here, the Court of Appeal had discretion as to whether to admit the evidence. It is clear from its disposition of the case that it gave no effect to it.

111 Under s. 672.78(3) if it allows an appeal against disposition, the Court of Appeal may make any disposition under s. 672.54 that the Board could have made. It may also refer the matter back to the Board which, in any event, must hold annual reviews of the NCR dispositions. In the normal course of events, the "fresh evidence" such as tendered here should simply be placed before the next Board's review. The only issue therefore is whether the "fresh evidence" tendered before the Court of

Appeal was such as to preclude the court from ordering the absolute discharge of the respondent.

112 Based on the rationale of *Stolar*, where a court of appeal is of the opinion that an NCR accused should have been granted an absolute discharge at the Board hearing, the new evidence should be virtually conclusive that an absolute discharge is not appropriate before a court of appeal should decide not to order it. Moreover, I wish to point out that contrary to the assumption expressed by my colleague Binnie J. at para. 56, it is not clear that an absolute discharge of an NCR detainee terminates the state's capacity to supervise and monitor the respondent's mental condition. Indeed, s. 672.82(1) of the *Criminal Code* provides for discretionary review of *any* disposition of the Board. When read in comparison to s. 672.81, which specifically excludes absolute discharges from mandatory annual reviews, s. 672.82(1) arguably opens the door to discretionary review even of an absolute discharge by the Board based on fresh evidence of dangerousness.

113 In any event, in my opinion, there is no reason to interfere with the exercise of the Court of Appeal's discretion in its appreciation of the fresh evidence tendered. The Court of Appeal was of the view, correctly I think, that the respondent should have been absolutely discharged by the Board in March of 2000. Rather, he was detained under very onerous and restrictive conditions. It was entirely open to the Court of Appeal, in the face of the reports as to his conduct while in detention, to maintain its conclusion that the respondent was not a significant threat to the safety of the public.

IV. Disposition

114 For these reasons, I would dismiss the appeal.

APPENDIX A

Criminal Code, R.S.C. 1985, c. C-46

> **16.** (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

> **672.34** Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from

criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

672.38 (1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

672.39 A Review Board must have at least one member who is entitled under the laws of a province to practise psychiatry and, where only one member is so entitled, at least one other member must have training and experience in the field of mental health, and be entitled under the laws of a province to practise medicine or psychology.

672.4 (1) Subject to subsection (2), the chairperson of a Review Board shall be a judge of the Federal Court or of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office.

672.43 At a hearing held by a Review Board to make a disposition or review a disposition in respect of an accused, the chairperson has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on persons appointed as commissioners under Part I of that Act.

672.51 (1) In this section, "disposition information" means all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making a disposition.

(2) Subject to this section, all disposition information shall be made available for inspection by, and the court or Review Board shall provide a copy of it to, each party and any counsel representing the accused.

672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the

accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

672.73 (1) An appeal against a disposition by a court or Review Board or placement decision by a Review Board shall be based on a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice.

672.78 (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

(*a*) it is unreasonable or cannot be supported by the evidence;

(*b*) it is based on a wrong decision on a question of law; or

(*c*) there was a miscarriage of justice.

(2) The court of appeal may dismiss an appeal against a disposition or placement

decision where the court is of the opinion

(*a*) that paragraphs (1)(*a*), (*b*) and (*c*) do not apply; or

(*b*) that paragraph (1)(*b*) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

(*a*) make any disposition under section 672.54 or any placement decision that the Review Board could have made;

(*b*) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or

(*c*) make any other order that justice requires.

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).

672.82 (1) A Review Board may hold a hearing to review any of its dispositions at any time, at the request of the accused or any other party.

(2) Where a party requests a review of a disposition under this section, the party is deemed to abandon any appeal against the disposition taken under section 672.72.

Appeal allowed, ARBOUR J. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Pinkofskys, Toronto.